IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs at Knoxville April 25, 2007

# STATE OF TENNESSEE v. LARRY D. DANIEL

**Direct Appeal from the Criminal Court for Davidson County**
**No. 2001-A-326 J. Randall Wyatt, Jr., Judge**

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**No. M2006-01670-CCA-R3-CD - Filed June 4, 2007**

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The appellant, Larry D. Daniel, pled guilty in the Davidson County Criminal Court to possession of a Schedule VI controlled substance with intent to sell and being a felon in possession of a weapon and received an effective two-year alternative sentence. Subsequently, the trial court revoked his probation and ordered that he serve his effective sentence in confinement. On appeal, the appellant claims that the trial court erred by revoking his probation. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Nathan Moore, Nashville, Tennessee, for the appellant, Larry D. Daniel.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kyle Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Factual Background

The record reflects that on April 19, 2001, the appellant pled guilty to possession of a Schedule VI controlled substance with intent to sell and being a felon in possession of a weapon, Class E felonies. He received an effective two-year alternative sentence, and the trial court ordered that he serve the sentence consecutively to a prior three-year probation sentence. On October 19, 2004, the trial court found that the appellant had violated his probation, ordered that he serve approximately one week in confinement, and "reinstated" his probation. On May 19, 2006, a probation violation warrant was issued, alleging that the appellant had violated his probation again

by being arrested for driving under the influence (DUI) on December 25, 2005.

At the probation revocation hearing, Terry Holbrook, the appellant's probation officer, testified that the appellant violated the rules of probation on December 25, 2005, by being arrested for DUI and that the appellant's DUI case had been bound over to the grand jury. He stated that other than the appellant's new arrest for DUI, he had not had any problems with the appellant. He said that in 2004, the trial court revoked the appellant's probation after the appellant tested positive for cocaine.

Gallatin Police Department Officer Dustin Rush testified that on the night of December 25, 2005, he was on routine patrol. He said that Officer Jackson, who was off-duty, called in to the police department and reported a reckless driver on Airport Road. Officer Jackson described the suspect's vehicle as a blue Nissan Titan pickup truck. Officer Jackson believed the driver was intoxicated because the driver had almost run him off the road and had traveled through a red light. Officer Rush stated that he was dispatched to the area. Five to eight minutes after receiving the dispatch, he saw a truck matching the off-duty officer's description turning from Airport Road onto Highway 25. He said that he stopped the truck and that "Officer Jackson's vehicle was still behind it." Officer Rush approached the driver's side of the truck, and the appellant rolled down the truck's window. Officer Rush noticed a strong odor of alcohol coming from inside the cab, asked the appellant to step out of the truck, and had the appellant perform field sobriety tests. Officer Rush "was not satisfied with [the appellant's] performance," believed the appellant was driving under the influence, and arrested him. The appellant refused to consent to a blood test, and Officer Rush transported him to the sheriff's department. Officer Rush stated that the grand jury indicted the appellant for DUI but that the appellant had not yet gone to trial.

On cross-examination, Officer Rush testified that he was dispatched to the area about 9:00 p.m. He stated that when he first saw the appellant's truck, the truck was stopped at a red light and made a right turn. Officer Rush did not observe any improper driving. After he stopped the appellant's truck, he had the appellant recite part of the alphabet, count backwards, and perform the walk-and-turn and one-legged stand tests. He stated that while the appellant was performing the walk-and-turn test, the appellant's heel never touched his toe as Officer Rush had demonstrated. While performing the one-legged stand test, the appellant lost his balance several times. The appellant also had some trouble reciting the alphabet. Officer Rush stated that he saw an open container of beer in the truck.

The trial court concluded by a preponderance of the evidence that "this man was impaired while he was driving at that time." The court noted that the appellant's case had been bound over to the grand jury and that the grand jury had indicted him for DUI. The court concluded that the appellant's probation should be revoked and ordered that he serve his effective sentence in confinement.

## II. Analysis

The appellant claims that the trial court erred by revoking his probation. Specifically, he contends for the first time on appeal that Officer Rush had no right to stop his truck because the stop was based on another officer's observations and because Officer Rush did not observe the appellant commit any crime. He argues that the evidence against him likely would have been suppressed at trial and, therefore, that "the trial court should have taken the allegation . . . under advisement, and set a bond pending resolution of the DUI arrest in Sumner County." We conclude that the trial court properly revoked the appellant's probation.

A trial court may revoke a sentence of probation upon finding by a preponderance of the evidence that the defendant has violated the conditions of his release. Tenn. Code Ann. § 40-35-311(e). The trial judge is not required to find that a violation of the terms of probation has occurred beyond a reasonable doubt. Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). The evidence need only show that the judge has exercised conscientious judgment in making the decision rather than acting arbitrarily. Id. Upon finding by a preponderance of the evidence that the appellant has violated the terms of his probation, the trial court is authorized to order an appellant to serve the balance of his original sentence in confinement. See Tenn. Code Ann. §§ 40-35-310, -311(e). On appeal, this decision will not be disturbed absent a finding of an abuse of discretion. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). In order to find such an abuse, there must be no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). Such a finding "'reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case.'" State v. Shaffer, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting State v. Moore, 6 S.W.3d 235, 242 (Tenn. 1999)).

Generally, a warrantless search or seizure is presumed to be unreasonable and any evidence discovered as a result is subject to suppression. U.S. Const. amend. IV; Tenn. Const. art. I, § 7; Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971); State v. Bridges, 963 S.W.2d 487, 490 (Tenn. 1997). However, a law enforcement officer may conduct a brief investigatory stop without a warrant if the officer has a reasonable suspicion based upon specific and articulable facts that a criminal offense has been, is being, or is about to be committed. See State v. Keith, 978 S.W.2d 861, 865 (Tenn. 1998). The facts forming the basis for an officer's reasonable suspicion do not have to rest upon the officer's personal knowledge or observations. See State v. Keith, 978 S.W.2d 861, 866 (Tenn. 1998) (citing Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924 (1972)). Moreover, our court has concluded that "[a]n officer may make an investigatory stop based upon a police dispatch as long as the individual or agency placing the dispatch has the requisite reasonable suspicion supported by specific and articulable facts that indicate criminal conduct." State v. Luke, 995 S.W.2d 630, 636 (Tenn. Crim. App. 1998).

In the present case, Officer Jackson reported to the police department that the appellant was driving recklessly and reported the make, model, and color of the appellant's vehicle. We note that Officer Jackson's information was presumed to be reliable. See State v. Melson, 638 S.W.2d 342, 354-56 (Tenn. 1982) (providing that information supplied by a known citizen informant is presumed

to be reliable); see also Luke, 995 S.W.2d at 637 (providing that a known citizen informant will be deemed reliable if "information about the citizen's status or his or her relationship to the events or persons involved" is present). Within five to eight minutes of the call, Officer Rush was dispatched to Airport Road and saw a truck matching Officer Jackson's description. Given Officer Jackson's report to the dispatcher that the appellant nearly ran him off the road and drove through a red light, Officer Rush could make an investigatory stop. Moreover, given Officer Rush's testimony that he smelled alcohol in the truck, that the appellant had an open container of beer in the truck, and that the appellant failed to perform field sobriety tests satisfactorily, we conclude that the trial court properly found by a preponderance of the evidence that the appellant violated the terms of his probation.

## III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE